STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 94-114

June 25, 1996

PUBLIC UTILITIES COMMISSION
Inquiry Into the Provision of
Competitive Telecommunications
Services (Chapter 280)

NOTICE OF PROCEDURES
TO BE FOLLOWED FOR
ARBITRATIONS AND REVIEWS
OF NEGOTIATED AGREEMENTS
UNDER THE
TELECOMMUNICATIONS
ACT OF 1996

OTHER PROCEEDINGS;
TERMINATION OF INQUIRY

Recently, in this docket, the Commission solicited comments from participants[1] concerning the procedures to be used for proceedings that are mandated by 47 U.S.C. § 252, enacted by section 101 of the Telecommunications Act of 1996.

I. LEGAL CONCLUSIONS

Upon the request of one or more telecommunications carriers, section 252 mandates two kinds of proceedings. Section 252(b) requires a state commission to "arbitrate" disputed issues between a telecommunications carrier that is requesting interconnection with an incumbent local exchange carrier (ILEC). The second mandated proceeding is for review and approval of a negotiated agreement between a telecommunications carrier and an ILEC.[2] We have reached the following general legal conclusions about the process that we must use for arbitrations or reviews of negotiated agreements under section 252:

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[1]The following persons filed comments on May 30, 1996: AT&T Communications of New England, Inc. (AT&T); Atlantic Cellular Telephone Corp. and Piscataqua Cellular Telephone Corp.; Independent Telephone Company Alliance (ITCA: Lincolnville, Tidewater, Mid-Maine, Unitel and Community Service telephone companies); MCI Telecommunications Corporation (MCI); NYNEX; the Telecommunications Resellers Association (TRA); independent members of the Telephone Association of Maine (TAM). The Public Advocate, AT&T, NYNEX, ITAM and ITCA filed reply comments on June 10, 1996.

[2]Entities attempting to negotiate an agreement may also request a state commission to participate in a negotiation or to mediate differences. 47 U.S.C. § 252(a)(2). The state commission may agree to mediate or may decline. This Order does not address the procedures that we would follow if we were requested to mediate. The fact that it does not do so should not be taken as any indication that we discourage such requests or that we would not mediate if requested to do so.

1. A federal statute has mandated that state utility regulatory commissions conduct certain proceedings.

2. Nothing in the federal statute states expressly or implies that it preempts any state procedure that applies in state proceedings.

3. Similarly, nothing in the federal statute would permit a state commission to ignore otherwise-mandated state procedures.

4. Nothing in state law allows a state agency to ignore procedures mandated by the state's Administrative Procedures Act (APA) or the agency's own rules solely because a state proceeding is one mandated by federal law.

5. Nevertheless, the Maine Administrative Procedures Act (MAPA), 5 M.R.S.A. §§ 9051(1) and (2), requires adjudicatory processes, including a hearing, only when a statute, constitutional law or agency regulations require a hearing or an opportunity for a hearing.[3] No agency rule and no statute requires the Commission to hold a hearing for the purpose of "resolving" the issues the Commission must consider in the arbitrations or reviews of negotiated agreements under 47 U.S.C. § 252. Neither Title 35-A or any other provision of Maine law requires the Commission to resolve the issues included in section 252. Nor does section 252 itself require a state commission to conduct a hearing. Section 252 requires the state commission only to "resolve" disputed issues in an arbitration (section 252(b)(4)(C)) or in the

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[3]Section 9051(1) states that "the procedures of this subchapter ["Adjudicatory Proceedings," 5 M.R.S.A. §§ 9051-64] shall apply "in adjudicatory proceedings." An "adjudicatory proceeding" is defined in 5 M.R.S.A. § 8002(1) as

> . . . any proceeding before an agency in which the legal rights, duties or privileges of specific persons are required by constitutional law or statute to be determined after an opportunity for hearing.

See also sections 9051(2), 9052(1) and 9052(2). Section 9052(1) requires notice of an opportunity for a hearing (to persons "whose legal rights, duties and privileges are at issue") when the "applicable statute or constitutional law requires that an opportunity for hearing shall be provided." Section 9052(2) requires notice when an applicable statute or agency regulation requires a hearing (as opposed to an "opportunity" for a hearing).

Sections 9051(2) and 9052(2) make clear that adjudicatory processes apply when an agency, in its discretion, decides to hold a hearing.

case of a negotiated agreement, to "approve or reject" it (section 252(e)(1)). Indeed, the title of one of the mandated processes ("arbitration") suggests that Congress had something other than adjudicatory hearings in mind.[4]

Accordingly, we conclude that no statute requires an adjudicatory hearing and that MAPA requires an adjudicatory hearing and other adjudicatory procedures only to the extent that one is required by "constitutional law" or that this Commission orders one in its discretion.

6. Given that no statute requires a hearing for the proceedings required by section 252, we may be required to determine whether an adjudicatory hearing is constitutionally required. Evidentiary hearings are required for the determination of issues that directly affect the rights and interests of particular persons. However, evidentiary hearings are only required to resolve issues of material fact, and they are "*never* required" for "issues of law or policy." Davis, Administrative Law Treatise, § 8.3 (Ed. 1994) (emphasis in original). By way of example, we believe that an issue such as how we should define "cost" and "additional cost" in sections 252(d)(1) and (2) is an issue of law and policy and is not one that requires an adjudicatory hearing, expert testimony or even discovery. By contrast, without deciding whether we are required to hold a hearing, the validity of cost data to be used may be a factual issue that, under the Constitution, requires an evidentiary hearing. We may, of course,
avoid the constitutional issue if we were to decide on our own that an evidentiary hearing is the best way to determine any particular issue.

7. Under the MAPA, if a hearing is required, whether by statute or by constitutional law, or if one is ordered by an agency in its discretion, certain specific rights must be provided both within and outside of a hearing. Section 9056(2) requires an agency to provide the rights to present evidence and argument and, if a hearing is held, to present witnesses and to cross-examine the witnesses of other parties. 5 M.R.S.A. § 9055, and P.U.C. Rules, Chapter 110, §§ 960-961, limit *ex parte* communications. In addition, 5 M.R.S.A. § 9062(2) states that if a presiding officer (hearing examiner) and advisors make a recommended decision to the Commission, that recommendation the Examiner's Report must be in writing and parties must

[4]We doubt Congress intended more elaborate procedures for consideration of a negotiated agreement. We note, however, that in order to reject a negotiated agreement, a state commission must "find" that the agreement discriminates against another carrier or that it "is not consistent with the public interest, convenience, and necessity." 47 U.S.C. § 252(e)(2). Neither of those general findings, especially the latter, which invokes policy considerations, necessarily requires a hearing to satisfy constitutional due process requirements.

have an opportunity to respond or file exceptions. If required by the constitution or even if we exercise our discretion to hold a hearing as to a particular issue, the APA indicates that the rights and requirements described above must be applied. 5 M.R.S.A. § 9051(2).

8. The Telecommunications Act mandates extremely short time periods to consider issues that may be complex and may require considerable analysis. In the case of a negotiated agreement, a state commission must render a decision within 90 days of the filing of the negotiated agreement. 47 U.S.C. § 152(e)(4). In the event of an arbitration, the Commission must render a decision within nine months of the requesting carrier's initial request for negotiations with the ILEC. Because an arbitration may be demanded only between 135 and 160 days following the initial request for negotiations, the state commission is allowed only between about 115 and 140 days to resolve issues in an arbitration. 47 U.S.C. § 252(b)(1), (4)(C).

9. In light of the foregoing, including the time constraints imposed by the Telecommunications Act, we will simplify our procedures to the greatest extent possible. Evidentiary hearings will be held to address issues only to the extent that a party convinces us that one is required by constitutional law or if we are convinced that a hearing is the best way to resolve an issue. Discovery may be restricted, or, for non-evidentiary issues, eliminated. Intervention may in some cases be denied, or the extent of participation may be limited.[5] We will attempt to resolve as many issues as possible with written argument

[5]If the APA is inapplicable, no right to intervene exists. Even if a proceeding that includes an adjudicatory hearing is required by constitutional law, the statute governing intervention as of right (5 M.R.S.A. § 9054(1) states that an intervenor must be "substantially *and directly* affected by the proceeding." (emphasis added) It is possible that for many issues, other ILECs and CLECs may not be directly affected by Commission decisions in an arbitration proceeding or by the Commission approval or rejection of a negotiated agreement. Nevertheless, in the interest of administrative economy, we would prefer to decide issues such as the definitions of "cost" and "additional cost" once. We may, therefore, exercise liberality in allowing intervention on certain issues, particularly where they may be resolved primarily by written argument.

and may eliminate certain stages that would otherwise be required by the APA, such as an examiner's report and exceptions.[6]

II. PROCEDURES

We will not at this time establish specific procedures for any particular proceeding. We will establish procedures for those proceedings on a case-by-case basis. Procedures will be established that are consistent with the guidelines stated above: hearings will be sparingly granted; written argument will be used to the greatest extent possible. Procedures that appear to be successful and efficient in earlier proceedings will be utilized in later proceedings.

At the outset of each proceeding we will hold a prehearing conference at which the procedures for the proceeding will be established. We will determine the issues that must be decided and what means we will employ to decide those issues. We will establish a schedule for discovery, to the extent that discovery is permitted. We will establish a schedule for filing testimony, to the extent that testimony is permitted.[7]

In the case of arbitrations, we will also explore the possibility at the prehearing conference of further negotiations under the auspices of the Commission. The only clearly-mandated process that section 252(b) requires is that parties may submit issues to this Commission for "resolution," and the Commission must resolve them. Nevertheless, subsection (b) is entitled "*Agreements* Arrived At Through Compulsory Arbitration" (emphasis added). Paragraph 5 of subsection (b) also refers to negotiations. Moreover, section 252(e) refers twice to "agreements adopted by arbitration under subsection (b)." *See* sections 252(e)(2)(B) and (4). Plainly, the references in section 252(b) indicate that Congress intended that further negotiations could take place.[8] The references to "arbitrated agreements" in section 252(e) are not as certain. To the extent that the

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[6]If the APA does not apply, there is no requirement that any recommendation by staff members advising the Commission must be in writing and subject to exceptions. We fully intend to rely on the advice of our staff in this proceeding.

[7]Section 252(b)(3) provides a "non-petitioning" party to respond to the petition "and provide such additional information as it wishes within 25 days after the state commission receives the petition." Because of the relatively short total time available to resolve issues, we will hold the prehearing conference prior to that time and will attempt to identify the issues at that time. Because petitions will generally follow negotiations, we expect that the petitions generally will accurately identify the unresolved issues. We may use the 25-day period under the federal statute as a period for which the non-petitioning party must file its initial brief and, to the extent that we decide that a hearing must or will be held, pre-filed testimony.

[8]If the adjudicatory processes of the Maine APA were applicable, they, too, anticipate settlements. 5 M.R.S.A. § 9053(2). *See also* Chapter 110, §§ 740-744.

Commission must "resolve" contested issues, there may be no agreement with the resolution by either party. Nevertheless, the references are not inconsistent with further negotiations.[9] We may also consider whether actual arbitration, as that term is commonly understood, or other alternative dispute resolution (ADR) techniques may be useful.

III. OTHER PROCEEDINGS; TERMINATION OF INQUIRY

For the present, we will not conduct a rulemaking or other proceeding for the purpose of establishing access charges for interconnection between competitive LECs and incumbent LECs. We will instead rely on arbitration proceedings and requests to approve negotiated agreements, as those may establish precedents that will guide the negotiations of other parties seeking to interconnect for the purpose of providing for local competition.[10] If it appears necessary in the future to establish more generally applicable rules, or to codify precedent that has been established in arbitration and negotiated-agreement proceedings, we will do so.

We will conduct a rulemaking to amend Chapter 280 of our rules to establish revised access charges for interexchange exchange service.[11] We anticipate that we will issue a

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[9]The references in subsection (e) to "arbitrated agreements" may refer to the fact that only contested issues are submitted to a state commission, and the state commission may only resolve the contested issues. The "arbitrated agreement" may refer to the final package of decisions that were previously agreed upon by the parties and those that were contested and resolved by the state commission. This interpretation is supported by the fact that a state commission has 30 days to approve a so-called "arbitrated agreement," in contrast to 90 days to approve a negotiated agreement and from 115 to 140 days to resolve contested issues in an arbitration. To add an additional 30-day period to "approve" issues that the state commission had just "resolved" within the 9-month deadline from the notice to negotiate would be nonsensical. We therefore view the 30-day period as additional to the period that the Commission has to resolve contested issues. In the 30 days, the Commission would review the previously agreed-upon issues that, together with the resolved contested issues, constitute an "agreement . . . adopted by arbitration under subsection (b)."

[10]Section 252(i) states that:

> a local exchange carrier shall make available any internet connection, service or network element provided under agreement, approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

[11]Our Notice of Rulemaking will explain our conclusion that the Telecommunications Act (47 U.S.C. §§ 251 and 252) does not establish pricing guidelines for intrastate

Notice of Rulemaking for interexchange access rates and for other revisions to Chapter 280 this summer.

We find that the current Inquiry in Docket No. 94-114 has served its purpose of providing the Commission with useful information and argument, but that there is no further need for it in light of the proceedings that we anticipate will occur in the near future. We therefore order it closed. Notice of the proceedings described above will be provided to all persons on the service list for the Inquiry.

Dated at Augusta, Maine, this 25th day of June, 1996.

BY ORDER OF THE COMMISSION

Christopher P. Simpson
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Hunt

interexchange competition access charges.